IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

ARNOLD MAXWELL HARRIS,)
Petitioner,)
vs.)
THE STATE OF WASHINGTON,) No. 7064
Respondent,)
and)
ROBERT D. McMULLEN, Judge of the Superior Court for Clark County,)
Respondent.)

70-5213

Supreme Court, U.S.
FILED
SEP 10 1971
E. ROBERT SEAVER, CLERK

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

BRIEF FOR THE RESPONDENT

To the Honorable, the Chief Justice and Associate Justices of the United States.

OPINIONS BELOW

Attorney for Respondent accepts petitioner's Opinions as set forth in Petitioner's Brief.

JUDGMENT

The judgment of the Washington State Supreme Court was entered on February 4, 1971. Rehearing was denied on March 24, 1971.

QUESTIONS PRESENTED

Does the double jeopardy provision of the Fifth Amendment to the United States Constitution prevent the State of Washington from trying petitioner, Arnold Maxwell Harris, for the alleged

murder of Mark Allen Harris and the alleged assault of Laila Violet Harris by means of a bomb sent through the mail when a jury found him innocent on a charge of murdering Ralph Burdick who was killed in the explosion of the same bomb.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; . . . Volume 1 U.S.C., Page XLVI.

STATEMENT

In Ashe vs. Swenson, 397 U.S. 436, 25 L. Ed 2d 469, 90 S. C. 1189 (1970), collateral estoppel became a constitutional protected doctrine under the Fifth Amendment. The Supreme Court of the United States in that decision observed, "The rule of collateral estoppel in criminal cases is not to be applied with the hypocritical and archaic approach of a nineteenth century pleading book but with reason and rationality."

In the light of the United States Supreme Court statement as such the Supreme Court of the State of Washington in the case of State of Washington vs. Arnold Maxwell Harris reported at 78 W.D. (2d) 919 en banc examined the entire record to ascertain whether the purpose of the constitutional protection against double jeopardy with respect to the application of collateral estoppel applied.

The Washington State Supreme Court did not examine the record with respect to collateral estoppel in a hypocritical and archaic manner but rather with reason and rationality. It was examined from the standpoint of protecting the defendant, Arnold Maxwell Harris, from being harassed from multi-prosecutions if in fact that was the case. It was examined from the standpoint of whether or not the State had deliberately chose to get a "dry run" by prosecuting its cases in this sequence. These

questions were answered in the negative.

In Ashe vs. Swenson, supra, the State candidly admitted that the first trial was merely a dry run for a second trial. The respondent herein made every effort to introduce, at the time of the first trial, a threat letter into evidence but was barred by the court's rulings. Petitioner, Arnold Maxwell Harris' attorney in the first trial continually objected in a most vehement manner with respect to introducing the threat letter into evidence. The salient portion of said letter is set forth in the en banc opinion of the State of Washington Supreme Court affirming trial court on Page 4, Footnote 1 as contained in the transcript of record as forwarded to the Supreme Court of the United States.

The trial of the State of Washington vs. Arnold Maxwell Harris cannot be equated to Ashe vs. Swenson, supra. In the second trial of Ashe vs. Swenson, supra, the witnesses were for the most part the same and their testimony in the second trial was "substantially stronger" with respect to the identity of the petitioner, Bob Fred Ashe. Two witnesses in the original trial who were unable to identify the petitioner, testified in the second trial that his features, size and mannerism matched those of one of their assailants. In another instance, one of the witnesses who had in the first trial identified the petitioner, Bob Fred Ashe, only by his size and actions subsequently remembered him by the unusual sound of his voice.

It is also to be found that in the second trial, the State absolutely failed to call a witness who had failed to identify the petitioner, Bob Fred Ashe, in the first trial. This is pure and simple a "dry run" and a refinement of the first trial. These facts do not apply to the case at hand. Fundamental fairness must apply for both the State of Washington as well as to Arnold Maxwell Harris.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

C. BRENT NEVIN
Prosecuting Attorney
Clark County, Washington

Attorney for Respondent